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In the Supreme Court of the United States

OCTOBER TERM, 1994

VOLKSWAGEN OF AMERICA, INC. AND
VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ,
RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

REPLY BRIEF FOR THE PETITIONERS

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Respondent has presented no credible argument why this case should not be held for review pending the disposition by this Court of *Myrick* v. *Fruehauf Corp.*, 13 F.3d 1516 (11th Cir.), cert. granted, 115 S. Ct. 306 (1994) (No. 94-286).

1. The question presented in this case is, at bottom, the same as the question presented in *Myrick*. Although respondent argues (Br. in Opp. 4) that "VW has mischaracterized Respondent's claim in an effort to gain certiorari review," the central thrust of respondent's opposition to VW's preemption defense in the courts below was "that *Cipollone* v. *Liggett Meyers, Inc.* [sic], 112 S. Ct. 2608 (1992), holds that where there are provisions in a

Congressional act relating to preemption a court may not proceed to find implied preemption beyond the scope of those provisions." Br. in Opp. 3.[1] Indeed, the Arizona Supreme Court's decision in this case was premised on its view that "the Supreme Court's decision in *Cipollone* casts an entirely different light on the issue of preemption." Pet. App. 11a. The Arizona Supreme Court stated that, but for the *Cipollone* decision, it "might have been constrained to adopt the view of the federal courts and find implied preemption." *Ibid.*

Whether, in fact, *Cipollone* repudiated a long line of preemption decisions and radically transformed federal preemption law to preclude implied preemption when there is an express preemption clause in a statute is the question presented in *Myrick*. See Pet. for Cert. i (whether the Safety Act "preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone* * * * forecloses such preemption"). The Eleventh Circuit in *Myrick* held that *Cipollone* was a dramatic departure from established federal preemption law. And, contrary to respondent's suggestion (Br. in Opp. 7), the *Myrick* decision plainly was a "[s]ignificant[]" factor in the Arizona Supreme Court's decision. Pet. App. 13a.

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[1] Respondent asserts without explanation (Br. in Opp. 8-9) that VW's petition should be denied because this case involves FMVSS 208 and *Myrick* involves FMVSS 121. As VW explained in its petition for certiorari (at 20-21), the differences between those standards are not relevant for purposes of deciding the general principles of federal preemption law presented in this case and in *Myrick*. In any event, if anything this is a stronger case for preemption than *Myrick*. See *Myrick*, U.S. Br. 24-29; *Myrick*, Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers as *Amici Curiae* in Support of Petitioners.

2. In an effort to suggest that there is no conflict between the tort claim in this case and FMVSS 208, respondent asserts that she "does not contend that VW should have selected one FMVSS 208 option over another." Br. in Opp. 4-5. Yet by claiming that a manually activated belt should have been added to a totally passive restraint system, that is precisely what respondent argues in support of her tort claim.

As VW explained in its petition for certiorari (at 6-7), FMVSS 208 gave it a choice whether to install a passive seat belt assembly (49 C.F.R. § 571.208, S4.5.3) or an active lap and shoulder belt system (*id.* at § 571.208, S4.1.2.3). Even respondent states expressly (Br. in Opp. 5 (emphasis added)) that "VW made a *choice* in deciding not to include active lap belts in cars equipped with its two point passive restraint system," and — because of that *choice* by VW, which was clearly and explicitly authorized by federal law — respondent seeks to impose tort liability. Thus, respondent plainly contends that VW should have selected "one FMVSS 208 option over another." Br. in Opp. 4. Imposing tort liability for the exercise of a federal safety design option creates a clear conflict with federal law in violation of the Supremacy Clause. See Pet. 13-14.

3. Respondent also claims that NHTSA has interpreted FMVSS 208 to establish only "'bare minimum performance standards,'" which VW was free to supplement with "additional safety belts," and that liability can be imposed under state law based on the failure to install "additional safety belts." Br. in Opp. 5 (quoting *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992)).

This conclusory argument boils down to a claim that one of the safety options authorized under FMVSS 208 was not, in fact, safe — despite the expert judgment of NHTSA to the contrary. As the government argued to this Court in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065

(1989), NHTSA promulgated FMVSS 208 to grant manufacturers several design options from which to choose a safety restraint system. U.S. Br. 12, 15; see also Pet. 6-7, 11-12. For each option, FMVSS 208 specified "minimum performance requirements." *Perry*, 957 F.2d at 1265. For example, if a manufacturer chooses to install an airbag system in its vehicles, FMVSS 208 establishes "minimum" performance requirements. *Ibid.*

Respondent does not contend, however, that the passive restraint system selected by VW did not perform as expected and required by FMVSS 208. Rather, respondent objects to the basic choice made by VW under FMVSS 208 to install a passive system at all. This is a crucial distinction that was drawn by the court in *Perry*, which noted that after a choice was made about a restraint system, "tort liability for the design of that system would not remove or require any particular choice, or otherwise frustrate 'flexibility' that the federal scheme provides." 957 F.2d at 1265. Respondent in this case, however, seeks to frustrate the federal scheme by challenging the very choice offered by FMVSS 208.

Moreover, even if respondent's claim were directed at the performance standards of passive restraint systems under FMVSS 208, rather than the design choice itself, those standards are the "legal minimum" required — not, as respondent suggests (Br. in Opp. 5), substantively *minimal*. Even the most onerous performance requirement would constitute a legal "minimum." As NHTSA has stated (41 Fed. Reg. 2391, 2392 (1976)):

> "[m]inimum" performance standards do not equate with "minimal" performance standards * * *. The word "minimum" in the statutory definition of motor vehicle safety standards * * * does not refer to the substantive content of the standards but rather to their legal status — that the products covered must not fall short of them.

In any event, the statutory term "minimum" does not change the preemptive effect of the statute or regulations. *Wood* v. *General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) ("[a]lthough the standards are 'minimum' in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not 'minimum' in relation to state law").

4. In the final analysis, the bulk of respondent's brief in opposition is devoted to a discussion of general issues of federal preemption under the Safety Act after *Cipollone*, which will be decided by this Court in *Myrick*. This case should, therefore, be held for that decision.

Respectfully submitted.

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